RACE OVER *RICE*: BINARY ANALYTICAL BOXES AND A TWENTY-FIRST CENTURY ENDORSEMENT OF NINETEENTH CENTURY IMPERIALISM IN *RICE V. CAYETANO*

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The Rice v. Cayetano *decision in which the Supreme Court struck down the voting requirement for Trustees of the Office of Hawaiian Affairs (OHA) that restricted eligible voters to only those of Hawaiian ancestry is an example of how apparently "neutral" legal decision making disguises intensely political aims. The narrative of the decision reflects not only a deep misunderstanding of Hawaiian history, but also constructs a too-familiar narrative of how Westerners "civilized" an indigenous people. Moreover, the Court's narrow and formalist approach to racial issues dictated a rigid binary analytical structure which distorted not only the claims of the Hawaiian people, but their very identity. In essence, they were forced to choose between whether they were a racial grouping but not a political entity, or that they were a political entity but not a racial grouping when, in fact, they may be considered both.*

The analytic premise of the Article is that strict scrutiny analysis is inappropriate when dealing with many issues concerning Hawaiians—even if they are a racial grouping—since the harm of which

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they complain is fundamentally different from the claims of other subordinated racial groupings within the United States. That is, while equal protection strict scrutiny seeks to protect groups excluded from the political and social processes within the United States, Hawaiians are asking for the redress of their loss of sovereignty caused by the United States and a remedying of the resulting harm which will, in essence, restore in some way their "separateness" from the United States.

Thus, the fundamental inquiry, consistent with the approach taken by other court decisions dealing with the claims of native peoples, must be not whether Hawaiians constitute a "race" and thus are being given a "racial preference" by a particular voting limitation, but whether they as a group have been specifically harmed by the illegal taking of their independence (a fact which the United States Congress itself acknowledged in 1993), and whether the voting limitation is rationally related to the remedying of that harm. The Court's refusal and failure to understand and deal with the nuances of harm and remedy can only have a negative future impact not only on the future claims of indigenous people, but on the American people as a whole and particularly people of color.

PROLOGUE

Life in all its varied richness has a nasty habit of refusing to conform to the imperative categories of the Law. The recent Supreme Court decision in *Rice v. Cayetano*[1] starkly illustrates the limitations of traditional legal doctrine to address the interrelationship between race and the rights of indigenous peoples. This doctrinal failure, combined with the current Court's inability and unwillingness to understand the complexities of American racial interaction, has produced a result that neither addresses the specific needs and circumstances of the Hawaiian people, nor offers any hope to people of color in general that the Court can be depended upon to alleviate racial injustice. The Supreme Court's decision in *Rice* was driven, in essence, by a framework that squeezed complex identities into a simple binary universe—whether Native Hawaiians were either a "political entity" or a "racial group." This attempt to squeeze complex identities into a simple binary universe is reminiscent of the colloquy between Alice and the Cheshire Cat:

"Cheshire Puss," she began, rather timidly, as she did not at all know whether it would like the name: however, it only grinned a little wider. "Come, it's pleased so far," thought Alice, and she went on. "Would you tell me, please, which way I ought to go from here?"

"That depends a good deal on where you want to get to" said the Cat.

1. 528 U.S. 495 (2000).

"I don't much care where —" said Alice.

"Then it doesn't matter which way you go," said the Cat.

"— so long as I get somewhere," Alice added as an explanation.

"Oh, you're sure to do that," said the Cat, "if you only walk long enough."

Alice felt that this could not be denied, so she tried another question. "What sort of people live about here?"

"In that direction," the Cat said, waving its right paw round, "lives a Hatter: and in that direction," waving the other paw, "lives a March Hare. Visit either you like: they're both mad."

"But I don't want to go among mad people," Alice remarked.

"Oh, you can't help that," said the Cat: "we're all mad here. I'm mad. You're mad."

"How do you know I'm mad?" said Alice.

"You must be," said the Cat, "or you wouldn't have come here."[2]

Just as Alice was trapped in the logical fallacy of the "false dilemma"—two choices are given, in a situation in which more than two choices exist—so too were Hawaiians forced to conform and to redefine themselves consistent with a legal doctrine constructed entirely by the racial assumptions and categories of a "colorblind" Court. In fact, however, the reality of Hawaiian lives, history, and remedy was very different.[3] Fortunately, Alice was able to wake from

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2. LEWIS CARROLL, ALICE IN WONDERLAND.

3. The "reconstruction" of the existence of indigenous people is nothing new. *See, e.g.*, Jo Carrillo, *Identity as Idiom: Mashpee Reconsidered*, 28 IND. L. REV. 511 (1995); Gerald Torres & Kathryn Milun, *Translating Yonnonido by Precedent and Evidence: The Mashpee Indian Case*, 1990 DUKE L.J. 625.

In *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940 (D. Mass. 1978), *aff'd sub nom.*, Mashpee Tribe v. New Seabury Corp., 592 F.2d 575 (1st Cir. 1979), the Mashpees in Massachusetts sued to recover land taken from them in violation of the Indian Non-Intercourse Act of 1790, which prohibited the transfer of Indian land to non-Indians without federal approval. The defendant, the Town of Mashpee, answered by asserting that since the plaintiffs were not a "tribe," they were outside the protection of the act and lacked standing. *Id.* Thus, the Mashpees were forced to define themselves in terms of what the federal law required rather than what they, in fact, were.

In an incisive piece on the *Mashpee* litigation, Professor Carrillo noted that there were significant obstacles that the Mashpees faced to show that they were a "tribe" under federal law: (1) they had to show they were made up of a distinct race, problematic because there had been intermarriage over the years; (2) they had to show that they had a distinct political leadership, problematic because the tribal and town government had been intertwined for over a century; (3) they had to show they were socially and culturally distinct, problematic since the Mashpees had adopted substantial aspects of American material culture; and (4) they had to show that the Mashpees inhabited a particular territory, problematic as the Mashpees had first acquired title to their land with the help of an English missionary. Carrillo, *supra*, at 522.

After concluding that the law on tribal identity "created and enforced a system of biases" ("Indianess" versus "non-Indianess"; "local" versus "Indian") as well as privileg-

her dream of this parallel "mad" universe. Unfortunately, there is no waking from what the current Court has wrought.

I. INTRODUCTION

There are a number of classic cases in racial jurisprudence which tortured arbitrarily constructed, binary racial categories to conform to the desired racial imperatives of the times.[4] For example, in *People v. Hall*,[5] the California Supreme Court decided that Chinese were "Negroes" to exclude their testimony.[6] In *Ozawa v. United States*,[7] the

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ing certain aspects of proof over others (e.g., ethnographically derived "expert" testimony over autoenthnographically derived testimony), Carrillo critiqued the scholarly literature that supported the Mashpee claims. In particular, she was wary of the approach suggested by Professors Torres and Milun in which they proposed a procedural solution. That is, given the structural biases against litigation in tribal culture, it was fairer to presume that Native American cultures were irreconcilably different from mainstream American culture than to have Indian plaintiffs litigate their identity. *Id.* at 531 (citing Torres & Milun, *supra*). Carrillo pointed out that the need theoretically to separate "Indianness" from "non-Indianness" carried within itself inherent dangers of essentialist stereotyping. *Id.* at 536-37. Carrillo concluded that because the law presumes Indian ways to be "primitive, chaotic, timeless, simple" and that "any tribal adaption to colonial society was in fact an assimilative embrace of the mainstream," it was problematic to counter these stereotypes by implicitly endorsing others through general or theoretical statements about inherent Indian cultural differences. *Id.* at 544-45.

In the circumstances of the Mashpees, Carrillo found a rich body of local evidence showing how the Mashpee had historically, as a group, treated the waterfront area of the town as a common resource despite their adoption over the years of the notion of private property. *Id.* at 543-44. Thus, there was significant evidence through this and other examples that the Mashpee's—despite having lost control of the town lands, adopting certain non-Mashpee beliefs and practices, and intermarrying with townspeople—had retained significant cultural identity. As such, "where territorial separateness has been compromised," the legal process must "help reveal what is under the surface of the stereotype" to allow the claims of indigenous people for the preservation of the inherent sovereignty to go forward and to succeed. *Id.* at 545.

4. Binary questions requiring "yes/no" answers also imply that there is a single answer and that answers are not affected "by who answered it or whose perceptions counted." MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 354 (1990). Minow preferred to approach the Mashpee issue without deciding definitional questions in "either/or categories," and instead proposed a line of inquiry "whether the plaintiff, given its history, ought to receive protection from land sales under federal law." *Id.* at 351-56. According to Minow, a better way to resolve complex issues of tribal identity would be to look to the substance of the underlying problem and to restructure the question in more fluid terms such as "for the purpose of protection against unscrupulous property transactions, should [the Mashpee] be a tribe?" MARTHA MINOW, NOT ONLY FOR MYSELF 74 (1997). This approach would mitigate the law's tendency to make identities "seem fixed, innate, and clearly bounded" by acknowledging that they are "complex and negotiated interactions." *Id.* at 59, 74.

5. 4 Cal. 399 (1854).

6. *Id.* at 403. In *Hall*, a Caucasian was convicted of murder based upon the testimony of Chinese witnesses. Two California statutes at that time forbade a "Negro" to

Supreme Court concluded that the "free white persons" eligible for naturalization were to be defined solely as Caucasians.[8] Yet, that very same year, the Court in *United States v. Thind*[9] held that a South Asian of Caucasian racial stock was not the kind of Caucasian included in the term "white person," and therefore was ineligible for naturalization.[10] In the now infamous *Plessy v. Ferguson*[11] case, the

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give evidence in a civil trial in which a "White person" was a party, or a "Black, or Mulatto person, or Indian" was to give evidence in a criminal proceeding against, or for, "a white man." *Id.* at 399. The issue was whether the testimony of the Chinese witnesses was admissible. *Id.* That is, the court was to determine whether a Chinese person was Caucasian, Black, or Indian. The California Supreme Court held that the term "Negro" did not only include Black people, but instead meant simply, the "opposite of white" (white defined by the court "in its generic sense" as Caucasian, and more specifically, European white man) and that the statute was designed to "protect the white person from the influence of all testimony other than that of persons of the same caste." *Id.* at 403. As such, "by every sound rule of construction," the terms encompassed by Black, Mulatto, or Indian would include "every one who is not of white blood." *Id.* The public policy reasons were compelling, the court explained, because the Chinese were a "race of people whom nature has marked as inferior, and who are incapable of progress or intellectual development beyond a certain point." *Id.* at 405.

7. 260 U.S. 178 (1922).

8. *Id.* at 198. In *Ozawa*, the appellant, born in Japan, applied for citizenship and, except for his race, was "well qualified by character and education for citizenship." *Id.* at 189. The issue, in essence, was whether Ozawa was a "free white person" eligible for naturalization under the Naturalization Act, which limited naturalized citizenship to "free white persons and to aliens of African nativity and to persons of African descent." *Id.* at 190. The Court held that "white person" was synonymous with "a person of the Caucasian race." *Id.* at 198. The Court, cognizant of the indeterminacy of that racial category, quickly added that "Caucasian" did not establish a "sharp line of demarcation" but rather a "zone of more or less debatable ground." *Id.* at 198. The appellant, the Court opined, was clearly of a race "entirely outside the zone on the negative side." *Id.*

9. 261 U.S. 204 (1923).

10. *Id.* at 214-15. In *Thind*, the appellee, "a high caste Hindu," was denied citizenship. *Id.* at 206, 215. The issue was whether he fell within the provisions of the Naturalization Act that allowed naturalization to "free white persons, and to aliens of African nativity and to persons of African descent." *Id.* at 207.

The Court was careful to point out that words of racial classification such as "Caucasian" were to be defined in terms of "common speech and not of scientific origin." *Id.* at 208. This occurred despite the Court's view that the racial category of "Caucasian" could encompass Hindu and Polynesians among others, given the presence "of the Caucasic cast of their features." *Id.* at 211. However, the Court concluded that even if "the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity," the Court opined that "the average man knows perfectly well that there are unmistakable and profound differences between them today." *Id.* at 209. Thus, all ethnological discussion of racial stock was unnecessary, because "free white persons" entailed "words of common speech, to be interpreted in accordance with the understanding of common man." *Id.* at 214. The Court, therefore, held that a Hindu is not "a white person" eligible for citizenship. *Id.* at 215. There was no discussion of whether a Hindu was eligible for naturalization on the basis of being "African."

11. 163 U.S. 537 (1896).

petitioner who was seven-eighths Caucasian was classified under the hypodescent rule as being "colored."[12]

In hindsight, these decisions had less to do with the limitations of jurisprudential decisionmaking than with the manner in which particular courts approached the racial status quo and the need these judges perceived to maintain the existing racial order of white dominance and privilege. The binary construction within their discourse was simply a potent means to that end.[13]

The binary box the Court constructed in *Rice v. Cayetano* was in response to a challenge to the voting scheme for the election of trustees of the Office of Hawaiian Affairs ("OHA").[14] That arrangement limited voting to Hawaiians, defined by law as descendants of the inhabitants of the Hawaiian Islands prior to 1778.[15] The petitioner, Harold "Freddy" Rice is a Caucasian rancher who traces his family's roots in Hawai`i back to the "mid-nineteenth century."[16] Rice brought suit claiming that these voting limitations violated the Fifteenth and Fourteenth Amendments, which prohibit discrimination on the basis of race.[17] The respondents, including OHA as an amicus, countered by arguing that the voting limitation was not racial, but rather a limitation that flowed from a recognition by the United States of its political relationship with aboriginal peoples and its long history of granting special rights and protections to such people based upon the fact that they once owned land now part of the United States.[18]

These articulated distinctions were crucial since the final determination of the case hinged upon whether the voting issue was defined as one which implicated racial categories and unwarranted racial discrimination or whether the issue involved the special status of indigenous peoples.[19]

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12. For a discussion of the rule of hypodescent ("one drop of blood" rule) and the construction of race and racial categories, see Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1, 23-26 (1991).

13. It was no coincidence that only four years before *Ozawa* and *Thind*, Congress had excluded all natives of Asia from immigrating into the United States. *Thind*, 261 U.S. at 215. As the *Thind* Court remarked, "it is not likely that Congress would be willing to accept as citizens a class of persons whom it rejects as immigrants." *Id.*

14. *Rice v. Cayetano*, 528 U.S. 495, 495 (2000).

15. *Id.* at 499 ("The smaller class comprises those designated as 'native Hawaiians,' defined by statute . . . as descendants of not less than one-half part of the races inhabiting the Hawaiian Islands prior to 1778.").

16. Brief for Petitioner, Rice v. Cayetano, 528 U.S. 495 (2000) (No. 98-818).

17. *Id.* at 1.

18. Brief of Amici Curiae Office of Hawaiian Affairs, et al. as Amici Curiae supporting respondent at 3, *Rice*, 528 U.S. at 495 [hereinafter OHA Brief] (stating "such rights are a function of historical relationship to the land, not race").

19. *Id.* ("This case thus does not involve [such] racial discrimination, but the power of Congress and the State of Hawai`i to fashion a limited program for the aboriginal

Reminiscent of Alice's false delimma, the Court's previous racial jurisprudence dictated that the legal issue be constructed solely as deciding whether Hawaiians were a racial category but not a political entity of indigenous people, or a political entity of indigenous people but not a racial category.[20]

It is my thesis that there is, in fact, a fundamental relationship between the notion of racial categories and the legal argument that indigenous peoples, such as Hawaiians, have a special political status and relationship with the United States. Indeed, doctrinal insistence upon the artificial separation reflects the superficiality of the Supreme Court's racial jurisprudence. This Article's initial premise is that the special political status of native Hawaiian people stems from the racial and cultural subordination inherent in their colonization and the longstanding assault on their sovereignty. Discussions of race, culture, and subordination are, therefore, inseparable from any analysis of the harms to this indigenous people that resulted from a loss of sovereignty.

The primary purpose of prohibitions against racial discrimination contemplated by the Fourteenth and Fifteenth Amendments was to remove racial barriers to full and equal participation in the polity by American racial groups who identify themselves as rooted in the sovereignty of the American nation.[21] This goal is entirely different from governmental programs instituted to rectify harms to a group of people resulting from the forcible loss of their independence and from the colonization foisted upon them by the American nation. Thus, any consideration of Hawaiian claims to recognition and reparation is fundamentally different from the consideration of claims of other American racial and ethnic communities. Such claims should be considered separately. The application of traditional Fourteenth Amendment strict scrutiny analysis to Hawaiian sovereignty issues is both misplaced and destructive, not only to Hawaiian people but also to people of color as a whole. The failure to engage in deeper dialogue about the ways in which race and the political status of indigenous people intersect leads to confusion at best, and often much worse. It also deepens the misunderstanding of both phenomena.

The arbitrary doctrinal separation of "race" and "special political status," forced upon indigenous people and people of color by the current Court's approach to race, is yet another example of how "neutral" legal doctrine continues both to create and to exacerbate racial and social inequity. Part II explores the narrative of the Supreme Court's decision in *Rice v. Cayetano*. It examines how *Rice* constructs

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people of Hawai`i. . . .").

20. *See id.* at 13-14.

21. *See infra* notes 105-21 and accompanying text.

whites as the inevitable and rightful rulers of Hawai`i. Part III explores the doctrinal interrelationship between race and the political status of indigenous peoples in the context of the Fourteenth Amendment's equal protection clause.

It is important for me to acknowledge at the outset that, as a non-Hawaiian, I hardly have standing to dictate any solution to the difficulties the Hawaiian people face in their struggle to reestablish sovereignty. Those solutions are for the Hawaiian people to decide for themselves. Rather, this Article critically examines how the limitations imposed by the Supreme Court's decision in *Rice*, and the biases imbedded in the law itself, impinge directly on the freedom and dignity not only of the Hawaiian people, but also of all subordinated groups and peoples.

II. THE HISTORICAL NARRATIVE OF THE *RICE V. CAYETANO* DECISION

If there is a textbook case in which majoritarian perspectives and racial norms masquerade as neutral narrative, it is the *Rice* decision. By the third paragraph of the decision, Justice Kennedy, for the Court, described petitioner Rice as "a Hawaiian in a well-accepted sense of the term" because Rice is a "citizen of Hawaii."[22] The issue of who is included in the universe of "well-accepted" is, of course, subjective. In the case of Justice Kennedy, it is also misinformed, biased, and plainly wrong. For the majority of the people of Hawai`i—native Hawaiians and non-Hawaiians alike—Freddy Rice is by no stretch of the imagination "Hawaiian."[23] The majority's blithe inability to adopt any perspective other than the dominant norm infects the entire decision.

Perhaps it is in the construction of the history of Hawai`i that this inability (and unwillingness) is most stark. In retelling history, the Court relies upon two works of Hawaiian history written many decades ago.[24] The Court then begins to create a remarkable narrative, essentially retelling the favorite American fairy tale of how the white man "civilized" the savage—this time in the context of Hawai`i.

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22. Ricev. Cayetano, 528 U.S. 495, 499 (2000).

23. *Honolulu Advertiser*, a conservative daily newspaper in Hawai`i, responded in an editorial by stating "Well-accepted where? Certainly not in Hawaii." *"Rice": How Well Does Court Understand Us?*, HONOLULU ADVERTISER, Mar. 2, 2000, at A8.

24. The Court relies almost exclusively on two works written by non-Hawaiians: L. FUCHS, HAWAII PONO: AN ETHNIC AND POLITICAL HISTORY, (1961); R. KUYKENDALL, THE HAWAIIAN KINGDOM, (1938); (1953); and (1967); *see also Rice*, 528 U.S. at 500. In that context, Justice Stevens in his dissent is right in his observation that the majority had failed to recognize the import of Hawaiian history, but wrong in his view that the majority had "splendidly acknowledged" the history itself. *See id.* at 534 (Stevens, J., dissenting). The basic problem was that the majority had recognized the importance of Hawaiian "history" as the majority falsely constructed it—a narrative of Western superiority and "reverse discrimination." *Id.*

A. The Court's Construction of Hawaiian History[25]

The Court begins its tale in language that is both stereotypic and patronizing. The Hawaiian people found "beauty and pleasure in their island existence, but life was not altogether idyllic"[26] because there was bloody internecine warfare and kings and other high officials "could order the death or sacrifice of any subject."[27] One could also, of course, characterize the sum of early European history as a time when everyday existence was marred by brutal internecine warfare and kings could order the death of any subject. Nevertheless, this patronizing perspective sets the theme of how the "civilizing influence" of the West affected Hawai`i.[28] It also runs as a not-so-subtle subtext throughout the opinion.

The Court characterized the nineteenth century missionaries not as cultural intruders but simply as those who "sought to teach Hawaiians to abandon religious beliefs and customs that were contrary to Christian teachings and practices."[29] Indeed, when the Court reviewed the increasing encroachment by Western interests during the nineteenth century, the majority characterized these events not as a greedy and hostile invasion, but rather as a benign "story of increasing involvement of westerners in the economic and political affairs of the Kingdom"[30] such that "[r]ights to land" became a principal concern for both Hawaiians and non-Hawaiians.[31]

The Court described the system of Hawaiian approaches to land use and ownership rooted in centuries of tradition and culture as feudal, although traditional Hawaiian concepts of land ownership are much more than simply "feudal."[32] As a result of this pressure to redefine land rights—ostensibly as the Court would have it, by the entire population of Hawai`i—the Court concluded that in 1848 a "fundamental and historic division" of land, known as "the Great Mahele," legitimated private land ownership and allowed foreigners to own land.[33] The exploitation, corruption, and greed by Western in-

25. With Professor Eric Yamamoto, I have also articulated a similar critique of the Court's recitation of Hawaiian history. *See* Eric. K. Yamamoto & Chris Iijima, *The Colonizer's Story: The Supreme Court Violates Native Hawaiian Sovereignty–Again*, 3 COLORLINES MAG. 6 (2000).

26. *Rice*, 528 U.S. at 500.

27. *Id.*

28. *See supra* note 25 and accompanying text.

29. *Rice*, 528 U.S. at 501.

30. *Id.*

31. *Id.*

32. *Id. But see infra* notes 43-47 and accompanying text.

33. *Rice*, 528 U.S. at 503. It is significant that the Court refers to "The Mahele" as "The Great Mahele." The adjective "great" was formerly used, but has been excised from the description by Hawaiian and other scholars because it was anything but

terests, resulting in massive tracts of Hawaiian land quickly being taken over by non-Hawaiians, was blandly and euphemistically characterized by the Court as land ownership merely becoming "concentrated."[34]

The Court then observed that there were "tensions" between an "anti-Western, pro-native bloc in the government,"[35] described by the Court as a group wanting monarchical control and no universal suffrage, and "Western business interests and property owners."[36] In the Court's construction of history, the latter group had to be the champions of enlightened democracy.[37] Indeed, in a remarkable example of turning history on its head, the Court recounted a tale of how Queen Lili'uokalani was repulsed in an attempt to restore "monarchical control over the House of Nobles and limiting the franchise to Hawaiian subjects."[38] According to the Court's recitation, it was Hawaiians who attempted an illegal overthrow, not the United States! Queen Lili'uokalani, in fact, was reacting to the forced imposition of a "Bayonet Constitution" in 1887, a purported new rule of law that greatly restricted the voting rights for Hawaiians due to property requirements, and disproportionately gave political power to whites and foreigners.[39]

The monarchy, according to the Court, was simply replaced by a provisional government and the Queen then, for reasons unexplained by the Court, "could not resume her former place."[40] Despite President Cleveland's displeasure at the "actions of the American Minister"[41] in establishing the provisional government, Justice Kennedy explained that the Republic of Hawai`i emerged in 1894, after which, the Queen voluntarily abdicated.[42]

The Court then recounted that President McKinley-in what the Court clearly accepts as a lawful and orderly action-signed the 1898 Joint Resolution annexing the Hawaiian Islands as a territory of the United States.[43] The Republic of Hawai`i ceded all former Crown, government, and public lands, according to the majority, and only

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"great" for the Hawaiian people. *See infra* notes 63-65 and accompanying text.

34. *Rice*, 528 U.S. 503; *see also infra* notes 49-50 and accompanying text.

35. *Rice*, 528 U.S. at 504.

36. *Id.* at 506.

37. *See id.* ("The conflicts came to the fore in 1887," when the Hawaiian Prime Minister was forced to resign and a new Constitution "reduced the power of the monarchy, and extended the right to vote to non-Hawiaiians.")

38. *Id.* at 504.

39. *See infra* notes 55-66 and accompanying text.

40. *Rice*, 528 U.S. at 505.

41. *Id.*

42. *Id.* at 504.

43. *Id.* at 505.

"two years later, the Hawaiian Organic Act established the Territory of Hawaii."[44]

In a glaring and most telling omission, the Court never acknowledged that the creation of OHA itself, as well as its voting limitation at issue, resulted from a vote by the entire multiracial population of Hawai`i.[45] Moreover, the Court barely mentioned the extraordinary Congressional Joint Resolution's Apology of 1993 to the native Hawaiian people for the United States's involvement in the illegal overthrow of Hawai'i. When the Court did mention the Joint Resolution in passing, its significance was entirely downplayed.[46] Justice Kennedy described the Apology Resolution simply as a review of "the role of [the American] Minister Stevens," and an accounting of "events in some detail."[47] The fact that Congress admitted explicitly that the

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44. *Id.*

45. OHA Brief, *supra* note 18, at 10. OHA was created by the delegates to the 1978 Constitutional Convention and was ratified by all of Hawai`i's citizens in the November 1978 general election. *See* HAW. CONST. art. XII, § 5 (creating OHA to "hold title to all real and personal property . . . in trust for native Hawaiians and Hawaiians" and for a board of trustees elected by beneficiaries of the trust).

46. *See Rice*, 528 U.S. at 505 ("Congress passed a Joint Resolution recounting the events in some detail and offering an apology to the native Hawaiian people.").

47. *Id.* One could interpret the joint resolution to acknowledge the 100th Anniversary of the January 17, 1893 overthrow of the Kingdom of Hawai`i as a document in which the United States essentially reasserted its dominion over Hawai`i. *See* Pub. L. 103-150, 107 Stat. 1510 (1993) ("Apology Resolution of 1993"). However, it is also a remarkable document in which Congress expressly acknowledged the United States complicity in the illegal overthrow of the Kingdom. Among other items, the Apology Resolution of 1993 made the following points:

> 1. Before the arrival of Europeans in 1778, Hawai`i had a sophisticated and organized society;
> 2. That from 1826 through 1893, the United States recognized the Kingdom of Hawai`i and extended it full diplomatic recognition;
> 3. That in 1893, the American Minister, John L. Stevens, "conspired with a small group of non-Hawaiian residents . . . to overthrow the indigenous and lawful Government of Hawaii";
> 4. That "in pursuance of the conspiracy" armed naval forces of the United States "invade[d] the sovereign Hawaiian nation" in 1893 in order to "intimidate Queen Liluokalani" and that "American and European sugar planters, descendants of missionaries, and financiers deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government";
> 5. That the recognition extended by the United States to this unlawful government was in violation of treaties between the two nations;
> 6. That Queen Lil'uokalani was forced to abdicate to avoid bloodshed;
> 7. That as a result of a congressional investigation concluding that U.S. diplomatic and military authorities had abused their authority, Minister Stevens was recalled and President Cleveland called for the undoing of the "substantial wrong" and a "restoration of the Hawaiian monarchy";
> 8. That in subsequent Congressional investigations, although the illegal "Provisional Government was able to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable to rally the

Hawaiian people never directly relinquished their inherent sovereignty as a people or their claims to their native lands to the United States, is neither addressed nor even acknowledged by the majority opinion.[48] In this light, it is particularly troubling to note the following colloquy at oral argument between Justice Scalia and the attorney for Petitioner Rice, Theodore B. Olson, with respect to the historical recounting of events in the Apology Resolution:

> Justice Scalia: You mean you're contradicting the congressional resolution that said we're guilty? Do we have to accept that-does-that resolution as an accurate description of history?
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> Mr. Olson: Of course, and this Court. . .
>
> Justice Scalia: Can't Congress make history? (Laughter)
>
> Mr. Olson: Congress does make history, but Congress, of course, can't change history. I'm not–we're not accepting everything that's in the so-called Apology Resolution.[49]

If this Court's paean to nineteenth century imperialism, presented as historical facts, were not bad enough, the Court's discus-

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support from two-thirds of the Senate to ratify a treaty of annexation";
9. That in 1894, the Provisional Government proclaimed itself the Republic of Hawaii and in 1895 forced Queen Lil'uokanlani to abdicate;
10. That the "self-declared Republic of Hawaii" through the Newlands Joint Resolution of Congress providing for the annexation of Hawai`i in 1898 ceded 1,800,000 acres of crown land "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government";
11. That the "indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their native lands";
12. That "the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land";
13. That the economic and social changes over the last century have been "devastating to the population and to the health and well-being of the Hawaiian people";
14. That Native Hawaiian people are "determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions." Apology Resolution of 1993, Pub. L. 103-150, 107 Stat. 1510-13 (1993).

48. Perhaps, more significantly, the Apology Resolution apologizes for not only the illegal overthrow, but the "deprivation of the rights of Native Hawaiians to self-determination"; and commits the United States to acknowledging "the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation efforts between the United States and the Native Hawaiian people." *Id.* at 1513.

49. Ka Wai Ola O OHA, Rice v. Cayetano Transcript Supplement (Volume 17, No. 1, January, 2000) [hereinafter "Supplement Transcript"]; United States Supreme Court Official Transcript, Rice v. Cayetano, No. 98-818, 1999 WL 955376, at *14 [hereinafter "Westlaw Transcript"]. The identification of Justice Scalia appears only in the first source. However, the colloquy appears in both sources.

sion of two important features of Hawaiian history starkly reveals the racial, historical, and political biases of the Court in another troubling way. The first was the devastation of the Hawaiian people by the introduction of Western diseases, which threatened to destroy the entire indigenous population.[50] The Court concluded that these illnesses "no doubt" were an initial cause of the "despair, disenchantment, and despondency" of the descendants of the early Hawaiian people.[51] Loss of sovereignty, exploitation and eviction from their own land, denigration and outlawing of language and culture are unnoticed, unmentioned, and unconsidered by a Court clinging to its own version of reality.

The next paragraph may be the most telling of all, however. The Court concluded its factual background by noting that Hawaiian history is marked by the influx of many immigrants.[52] It specifically alluded to the "Chinese, Portuguese, Japanese, and Filipino" migrations to Hawai`i.[53] There is, however, one group never referred to nor described as an "immigrant" group. That group is constructed differently from immigrants because throughout the opinion it is assumed to be the rightful and natural heir to the land of Hawai`i. It is not insignificant that the Court refers to the Tahitians as the first Polynesian settlers of Hawai`i and consistently also refers to white immigrants as settlers.[54] This latter group—apparently never immigrants—consists of white missionaries and other "settlers." Their descendants are implicitly constructed in this way as the natural heirs to Hawai`i. In other words, these "nonimmigrants" are the ancestors of Freddy Rice.

B. The Counter-Narrative of Hawaiian History[55]

The Court's recitation of Hawaiian history eerily confirms the observation of Professor Haunani-Kay Trask that "so much of what passes for Hawaiian history [is] nothing more than a series of political myths created by foreigners and designed to disparage our people."[56] Indeed, as Trask prophetically observed:

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50. *Rice*, 528 U.S. at 506.

51. *Id.*

52. *Id.*

53. *Id.* ("The other important feature of Hawaiian demographics to be noted is the immigration to the islands by people of many difference races and cultures.").

54. *See id.* at 500 ("The origins of the first Hawaiian people and the date they reached the islands are not established with certainty, but the usual assumption is that they were Polynesians who voyaged from Tahiti . . .").

55. It should be noted here that my purpose in presenting this "counter-narrative" is certainly not to purport to give a complete account of Hawaiian history, but merely to illustrate and to emphasize distortions contained in the *Rice* decision.

56. HAUNANI-KAY TRASK, FROM A NATIVE DAUGHTER 129 (2d ed. 1998).

> [T]here is always that particular variant of racism that fashions America's moral stupidity: vociferous denial of the presence, unique histories, and self-determination of America's conquered Natives. To Hawaiians, *haole* Americans seem to cherish their ignorance of other nations (especially conquered peoples who live wretched lives all around them) as a sign of American individualism.[57]

The history of Hawai`i is far from the benign fairy tale the Court attempts to pass off as historical fact. The story of the United States's involvement in Hawai`i actually is a tale of the usurpation of a stable society and a rich culture through deception and force, power, and greed.

While Native Hawaiians may have found "beauty and pleasure in their island existence,"[58] it is perhaps more accurate to characterize their existence as a society that lived in harmony with *akua*(gods), *'aina* (land), and *kanaka*(humans).[59] Traditional Hawaiian society was an intricate system in which *akua* provided *kanaka* with *'aina* and all that it provided. In exchange, *kanaka* were stewards of the *'aina,* obligated to care for what *akua* provided as well as to honor the *akua*. Thus, it was the duty of the *ali'i nui* (king/queen) to balance these forces. Contrary to the Court's simplistic and misleading notion that kings "could order the death or sacrifice of any subject,"[60] the role of the *ali'i nui* was much more complex because:

> *ali'i nui* were the protectors of the *maka'ainana*. . . should famine arise, the *ali'i nui* were held at fault and deposed. Alternatively, should an *ali'i nui* be stingy and cruel to the commoners, the cultivators of the *'aina*, he or she would . . . be struck down, usually by the people.[61]

Moreover, the land system was hardly feudal in any accurate historical sense. The *maka'ainana* cultivated the land but they were neither bound to a cruel *ali'i nui* nor were they obligated to stay on alloted land, "unlike feudal European economic and political arrangement . . . the maka'ainana neither owed military service to the ali'i nor were they bound to the land."[62] Thus, an interdependence existed in pre-Western Hawaiian society whereby commoners were free to move in order to live under an *ali'i* of their choosing, while *ali'i* increased their status and prosperity by attracting more people to their *moku* (domain).[63] The result was to create an incentive for the leaders

57. *Id.* at 18. Professor Trask's book contains a brief but powerful history of Hawai`i. *Id.* at 4-19.

58. *Rice*, 528 U.S. at 500.

59. LILIKALA KAME'ELEIHIWA, NATIVE LAND AND FOREIGN DESIRES 25-26 (1992).

60. *Rice*, 528 U.S. at 500.

61. KAME'ELEIHIWA, *supra* note 59, at 26.

62. TRASK, *supra* note 56, at 5.

63. *Id.*

of Hawaiian society to provide well for the welfare of their constituents.[64] In 1848, under pressure from missionaries and Western business interests, Kamehameha III approved a plan known as "The Mahele." This radical reform ended the traditional land system and gave Westerners the ability to purchase land.[65] Much more than just "concentrating" land ownership as Justice Kennedy characterized it, the Mahele "opened the way to the same massive loss of native land that occurred among Indians in North America."[66] By 1888, it is estimated that "three-quarters of all arable land was controlled by *haole*."[67] In fact, the "tensions" to which the Court's opinion so obliquely referred culminated in 1887 when King David Kalakaua, yielding to pressure from Western business interests signed what became known as the "Bayonet Constitution." This document gave the voting franchise to Americans and Europeans irrespective of citizenship. Moreover, the property requirement for voting was so high that most Native Hawaiians could not vote in their own land.[68]

Subsequently, upon her ascension to the throne in 1892, and fearing the disenfranchisement of her people, Queen Lili'uokalani considered a new constitution limiting the vote to Hawaiian-born or naturalized citizens.[69] Using the rumors of such a new constitution, a small group of conspirators, white businessmen who controlled the economy, plotted the overthrow of the monarchy and annexation to the United States.[70] In 1893, the conspirators, with the active support and participation of the United States Minister, John L. Stevens, and the United States Marines, took control of the government building and declared a provisional government that immediately was recognized by Minister Stevens.[71] Determined to prevent bloodshed,

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64. *Id.*; *see also* Amicus Brief of State Council of Hawaiian Homestead Associations, Hui Kako'o 'Aina Ho'opulapula, Kalama'ula Homestead Asociation, and Hawaiian Homelands Commission [hereinafter Hawaiian Homestead Brief] at 4 (stating that reciprocal relationships wove a fabric of mutual obligation between *ali'i* and *maka'ainana*). "Land use developed around geographic units extending from mountain to ocean" (*ahupua'a*), and since there was an interrelationship between farmer and fisherman, there was "an extended family network known as *'ohana.'" Id.* at 4-5. The amicus brief specifically noted that the Hawaiian land tenure system was unique and "mischaracterized as feudal." *Id.* at 4.

65. Hawaiian Homestead Brief, at 7.

66. *Id.* at 7-8. In the 1890 census, of nearly 90,000 total population in Hawai'i, a relatively small number of Westerners owned over a million acres. *Id.* (quoting MELODY K. MACKENZIE, NATIVE HAWAIIAN RIGHTS HANDBOOK 10 (1991) [hereinafter HANDBOOK]). Moreover, the Hawaiian population had been decimated by two thirds. *Id.* at 10.

67. TRASK, *supra* note 56, at 7.

68. HANDBOOK, *supra* note 66, at 10.

69. *Id.*

70. *Id.* at 11-12.

71. *Id.* at 12. Despite the Court's implication that Minister Stevens acted unilater-

Lili'uokalani relinquished her authority. On February 1, 1893, the United States placed the provisional government under its protection and "hoisted the American flag over Hawai`i."[72]

President Harrison's pro-annexation administration was replaced in 1893 by the administration of President Grover Cleveland, who opposed annexation, condemned the misuse of American power, and called for the restoration of the monarchy.[73]

The following year, a constitutional convention, dominated and controlled by the provisional government, created voting qualifications so stringent that few Hawaiians and no Asians could vote.[74] The "Republic of Hawai`i" was proclaimed by the usurping Western interests.[75] Despite the protests of Lili'uokalani, major foreign powers recognized the new "republic," and it claimed title to the almost two million acres of former Government and Crown Lands without any compensation.[76] After a brief uprising by those loyal to the heir, Queen Lili'uokalani involuntarily abdicated while confined under house arrest and in fear for the lives of her supporters.[77]

Nevertheless, a two-thirds majority of the United States Senate could not be mustered to approve a treaty of annexation. In 1898, therefore, Hawai`i was "annexed" by means of a joint congressional resolution.[78] The Republic of Hawai`i then ceded almost two million acres of land to the United States without compensation.[79] This entire transfer from independent Kingdom to annexed territory transpired despite overwhelming opposition to annexation among the Hawaiian people.[80]

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ally, without support by the United States government, one of the conspirators was expressly told by the Secretary of the Navy on a visit to Washington, D.C. that the Harrison Administration would look "sympathetically" upon an annexation proposal of Hawai`i to the United States. *Id.* at 11.

72. *Id.*

73. *Id.*

74. *Id.* at 12.

75. *Id.* at 13.

76. *Id.*

77. *Id.*

78. OHA Brief, *supra* note 18, at 6. It should be noted that the annexation of Hawai`i by joint resolution outside of the treaty-making power of the Senate and Executive, and in the absence of a plebiscite of the acquired territory is unprecedented and probably unconstitutional. Although Texas was annexed by joint resolution in 1845, it was in the context of the congressional power to admit new states. HANDBOOK, *supra* note 66, at 24 n.100.

79. Hawaiian Homestead Brief, *supra* note 64, at 9. In 1910, Queen Lili'uokalani unsuccessfully sued to recover the Crown Lands. Liluokalani v. United States, 45 Ct. Cl. 418 (1910).

80. Hawaiian Homestead Brief, at 9. More than 21,000 Hawaiians signed petitions opposing annexation at a time when the entire population numbered 40,000. *Id.* at 9 n.28. There are some who estimate the petition signatures even higher into the 30,000

It is important to understand the backdrop and context of this early history to understand the basis for the major events in Hawaiian history that followed including:

> 1. The Hawaiian Homes Commission Act of 1920, which in recognition of the economic, political, and psychological dislocation that the dispossession of Hawaii had caused to native Hawaiians, set aside 200,000 acres of former kingdom lands for native Hawaiians;[81]
>
> 2. The requirement, as a condition for statehood admission, that Hawai`i accept responsibility for the Hawaiian Home Lands;[82]
>
> 3. The additional requirement by the Admission Act to hold 1.2 million acres of ceded Government and Crown Lands in trust for the "betterment of the conditions of the native Hawaiians" among other purposes;[83]
>
> 4. The 1978 creation of OHA and its voting restriction by constitutional amendment, and its ratification in a general election by all of Hawai`i's registered voters.[84]

Moreover, it is against the background of this historical context that the continued desecration of Hawaiian 'aina and culture must be considered. It also provides perspective to understand better the Hawaiian people's call for self-determination and sovereignty.[85] Yet the

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range and above. *See, e.g.*, Erin Texeira, *Native Hawaiians Gather at Capitol to Bring Attention to Plight*, DALLAS MORNING NEWS, Aug. 9, 1998, at 14A; *Anti-Annexation Petitions*, *at* http://www.alohaquest.com/scripts/anti_annexation_petitions.html (last visited Oct. 3, 2000). The motivation driving the intense desire to acquire Hawai`i in the face of opposition, not only in Hawai`i as well as in the Senate, is understandable when looking at its historical context. In 1898, the Spanish American War was being waged for an American presence in the Far East. Hawai`i as well as the Philippines became highly valuable and strategic military territories. *See* HANDBOOK, *supra* note 66, at 14.

81. Hawaiian Homes Commission Act, ch. 42, 42 Stat 108 (1921).

82. The Admission Act of March 18, 1959, Pub. L. No. 86-3, § 4, 73 Stat. 4 (1959).

83. *Id.* § 5(f) (conveying 1.2 million acres of lands to be held in trust for the following purposes: the support of public schools and educational institutions, the betterment of the conditions of native Hawaiians, for the development of farm and home ownership, for the making of public improvements, and for the provision of lands for public use).

84. HAW. CONST., art XII, §§ 5, 6 (added by the Constitutional Convention of 1978 and ratified by general election on Nov. 7, 1978) (establishing the Office of Hawaiian Affairs and its Board of Trustees "elected by qualified voters who are Hawaiians, as provided by law").

85. *See, e.g.*, HANDBOOK, *supra* note 66, at 77-98 (discussing various groups, issues, and events relating to the struggle for Hawaiian sovereignty); Susan Essoyan, *First Hawaiians Seek Return to Some Sovereignty*, L.A. TIMES, July 22, 1992, at A5; Robert Reinhold, *A Century After Queen's Overthrow, Talk of Sovereignty Shakes Hawaii*, N.Y. TIMES, Nov. 8, 1992, at 24; Michael Sangiacomo, *Hawaiian Groups Seek Self-Rule*, PLAIN DEALER (CLEVELAND, OHIO), Feb. 7, 1994, at 7A.

Court pointedly refused to acknowledge this context anywhere in its opinion.

III. THE MISUNDERSTANDING OF RACE IN *RICE V. CAYETANO*

The Court opened its legal analysis with the observation that the Fifteenth Amendment was enacted to ensure emancipated slaves the right to vote, "lest they be denied the civil and political capacity to protect their new freedom."[86] The Court then opined that the amendment's terms transcend "the particular controversy which was the immediate impetus for its enactment" to grant "protection to all persons."[87] The Fifteenth Amendment, according to Justice Kennedy, reaffirmed "the equality of races at the most basic level of the democratic process, the exercise of the voting franchise."[88]

This doctrinal introduction emphasizes the empty formalism of the Court's conclusion. Justice Kennedy never returns to the underlying reason why "protection" of the voting franchise is so basic. As his majority opinion acknowledges, the Fifteenth Amendment's "protection" was premised on the necessity for newly empowered African American former slaves to guard against the reinstitution of subordination.[89] Equality of participation in the democratic process thus was hardly a mathematical abstraction, but rather a means to help ensure against unjust domination of one group by another. It is in this context that the analysis of the Fifteenth Amendment cases must be viewed—context that the Court again completely ignores.

The Court specifically analogized the OHA voting mechanism to the circumstances of two Fifteenth Amendment cases, *Guinn v. United States*[90] and *Terry v. Adams*.[91] In *Guinn*, Oklahoma exempted voters whose ancestors were previously eligible to vote before January 1, 1866, from a literacy requirement for voting eligibility, effectively exempting many white voters from the literacy requirement.[92] The resulting reality was that African Americans were almost exclusively required to conform to the literacy requirements. The Supreme Court found that the requirement was a racial exclusion prohibited by the Fifteenth Amendment.[93]

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86. *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). The Fifteenth Amendment reads in relevant part, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend XV, § 1.

87. *Rice*, 528 U.S. at 512.

88. *Id.*

89. *See id.*

90. 238 U.S. 347 (1915).

91. 345 U.S. 461 (1953).

92. *Guinn*, *238* U.S. at 357.

93. *Rice*, 528 U.S. at 513 (citing *Guinn*, 238 U.S. at 364-65).

In *Terry*, African Americans were excluded from participating in the primary of a "private" Texas association, whose handpicked candidates always became the choices of the Democratic Party. The Court held this exclusion was in violation of the Fifteenth Amendment as it stripped African Americans of the power to select their local county officials.[94]

Clearly in the cases relied upon by the Court, the Fifteenth Amendment protected politically disempowered African Americans from the attempt by the politically dominant racial group to keep them from gaining political, civil, and social equality. Justice Stevens's dissent in *Rice* noted the Court's glaring failure to analyze the relevance of these circumstances to the *Rice* situation.[95] The majority simply ignored "overwhelming differences" between the context of Fifteenth Amendment case law and the "unique history of Hawai`i."[96] Indeed, "the former [recalled] an age of abject discrimination against an insular minority in the old South; the latter at long last [yielding] the 'political consensus' the majority claims it seeks."[97] Stevens added:

> [T]he voting laws held invalid under the Fifteenth Amendment in all of the cases cited by the majority were fairly and properly viewed through a specialized lens—a lens honed in specific detail to reveal the realities of time, place, and history behind the voting restrictions being tested.
>
> That lens not only fails to clarify, it fully obscures the realities of this case, virtually the polar opposite of the Fifteenth Amendment cases on which the Court relies . . . [that] have no application to a system designed to empower politically the remaining members of a class of once sovereign, indigenous people. [98]

The simplistic formalism of the majority's use of Fifteenth Amendment jurisprudence also is reflected in the superficiality of the Court's treatment of race. The Court first declared that Hawaiian ancestry is a proxy for race because the various state and federal statutes relating to Hawaiian people "reflect the . . . effort to preserve [a] commonality of people"[99] to "treat the early Hawaiians as a distinct people, commanding their own recognition and respect."[100] Later in its opinion, however, the Court declared that "[o]ne of the principle reasons race is treated as a forbidden classification is that it demeans

94. 345 U.S. at 462, 469.
95. *Rice*, 528 U.S. at 546 (Stevens, J., dissenting).
96. *Id.*
97. *Id.*
98. *Id.* at 540.
99. *Id.* at 515.
100. *Id.*

the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."[101] Due to a basic inability or unwillingness to understand the significance of juxtaposing these two ideas, the Court neither understands nor synthesizes the different meanings and uses of race. That is, the majority fails to understand that race can be a marker, a category that entails recognition and respect of a people whose history has been one of demeaning subordination, while race can simultaneously be used as a marker by a dominant group in order to subjugate another.

Professor Eric Yamamoto has noted that the Supreme Court regards all racial classifications in the "same skeptical legal fashion, regardless of whether a classification is designed to end a white-controlled racial caste system or perpetuate it."[102] To the current Court, all that matters is whether race is involved. Scrutinizing the context of racial identities, racial histories, and racial dynamics is irrelevant.[103] Yet, one cannot discuss race without discussing those issues. As many people writing about race now understand, racial history and dynamics are the criteria that actually *define* race.

The location and understanding of race are no longer found in "definitions of biological characteristics, historical commonality or essential identity," or as an "attribute within people," but rather it is "a complex set of relations between people."[104] Race is a fluid social construction used for various and different social and political ends. The meanings and ultimate definitions of race have been constructed to create and maintain white dominated racial hierarchies on the one hand,[105] and subordinated people of color to contest the associations that hierarchy has imposed on the other.[106]

Writing about the case of *Hernandez v. Texas*,[107] in which the

101. *Id.* at 517.

102. ERIC K. YAMAMOTO, INTERRACIAL JUSTICE, CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA 45 (Richard Delgado & Jean Stefancic eds., 1999).

103. *See id.*

104. Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 STAN. L. REV. 747, 751 (1994). For more extensive discussions of race as a legal and social construction, see MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES 55 (1994) ("[R]ace [is] an unstable and 'decentered' complex of social meanings."); Neil Gotanda, *A Critique of "Our Constitution is Colorblind,"* 44 STAN. L. REV. 1, 4 (1991) (noting that race is a socially constructed category and not a natural or scientific one). For a brief discussion of the Court's ideological approach to racial jurisprudence, see YAMAMOTO, *supra* note 102, at 44-47.

105. See *supra* notes 7-9 and accompanying text.

106. *See, e.g.*, IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 165-67 (1996) (stating that race is a relationship in which different groups are defined against one another such that White becomes a positive mirror image against which a category of non-Whites which is defined as its negative opposite).

107. 347 U.S. 475, 482 (1954) (holding the Fourteenth Amendment extended to provide equal protection to persons of Mexican descent).

Warren Court extended Fourteenth Amendment protection to Latino/as, Professor Ian Haney Lopez observed that the protection was extended not on the ground that Mexican Americans constituted a protected racial group, but because Mexican Americans belonged to a class that suffered racial discrimination in Texas.[108] Lopez points out how the biological definition of race could not be neatly applied to Mexican Americans. In fact, "all concerned parties agreed . . . [they] were White; though officially so, the dark skin and features of many Mexican Americans seemingly demonstrated that they were non-White; though . . . not neatly categorized as Red, Yellow, or Black."[109] Thus, it was "in the attitudes toward and the treatment of Mexican Americans, rather than human biology, that one must locate the origins of Mexican-American racial identity."[110] Lopez concluded:

> Any biological basis to race has now been soundly repudiated. Instead, races are human inventions in which notions of transcendental, innate similarity, and difference are assigned to physical features and ancestry. The assignment of racial boundaries arises in the form of social practices, and so reveals itself to be a highly contingent, historically specific process.
>
> In fact, no more accurate test could be fashioned to establish whether Mexican Americans, or any other group, constitute a race. Race is not biological or fixed by nature; it is instead a question of social belief. . . . [W]hether a racial group exists is always a local question to be answered in terms of community attitudes.[111]

Conversely, racial identity can be used to help preserve the commonality of a subjugated people.[112] Put more concretely:

> Moreover, the word "race"—or rather the Spanish equivalent *raza*—has special significance for Latino/as in the United States,

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108. Ian F. Haney Lopez, *Race and Erasure*, *in* RICHARD DELGADO & JEAN STEPHANCIC, THE LATINO/A CONDITION 180-81 (1998) [hereinafter LATINO/A CONDITIONS].

109. *Id.* at 183.

110. *Id.*

111. *Id.* at 184. In *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), the Supreme Court held that discrimination against people of the Jewish religion was racial discrimination because "the question . . . is not whether Jews are considered to be a separate race by today's standards, but whether at the time [section] 1982 was adopted, Jews constituted a group of people Congress intended to protect." *Id.* at 617.

112. *See* Mary Coombs, *Interrogating Identity*, 2 AFR.-AM. L. & POL'Y REP. 222, 226 (1995) (defining blackness as the "experience[] of racial subordination," "knowledge of . . . African American culture," "commitment to . . . community," and loyalty "to essential credos"); Chris K. Iijima, *The Era of We-Construction: Reclaiming the Politics of Asian Pacific American Identity and Reflections on the Critique of the Black/White Paradigm*, 29 COLUM. HUM. RTS. L. REV. 47, 53-54 (1997) (observing that the political character of a subordinated group's racial identity is, in part, its reaction to white supremacist ideology).

> particularly for Chicanos. *Raza* evokes a primeval and mystical union with the indigenous people that populated the North American expanse of Aztlan. The natives of Aztlan spread south and eventually formed the Nahuatl tribes living in Mexico as the European conquest began. The concept of race also has political connotations. "Raza" is the name taken by the organizations that initiated and have continued the struggle for political, social, and economic empowerment of the Chicano community.[113]

People of color understand how racial dynamics have influenced every aspect of our collective and individual lives. Thus the Court's conclusion that "inquiry into ancestral lines is not consistent with respect based on the unique personality each of us possesses" only underscores a fundamental lack of understanding of race's meaning and significance.[114] For the Court, the evil of racism "is no longer individual and institutional acts of white supremacy but, rather, [merely] the recognition of racial differences."[115] Thus, rather than look at the *specific and particularized harms* that the historical and social conditions have created for the Hawaiian people—reflecting a real understanding of race—the *Rice* Court merely undertook an abstract hunt and peck search for any racial references.

Reflecting the intellectual (and moral) emptiness of the majority's approach to race, the Court's formalistic approach to racial issues is disturbingly simplistic: (1) search for some element to which race can be ascribed; and (2) once found, triumphantly pronounce its presence unconstitutional, replete with appropriate abstractions about the value of individuals and how "demeaning" any reference to race must be.[116]

Consistent with this hunt and peck methodology, after finding references to Hawaiians as a race in draft amendments to the Hawai`i State Constitution, state legislature conference committee reports, and the statutory definition of Native Hawaiian, the Court held that the "ancestral tracing" required by the OHA voting re-

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113. ANGEL R. OQUENDO, *Re-Imagining the Latino/a Race*, *in* RICHARD DELGADO & JEAN STEFANCIC, THE LATINO/A CONDITION 69 (1998).

114. *Rice*, 528 U.S. at 517.

115. YAMAMOTO, *supra* note 102, at 45.

116. *See Rice*, 528 U.S. at 517. Incredibly, in the final paragraph of its sanctimonious lecture on race, the Court cited with approval *Hirabayshi v. United States*, 320 U.S. 81 (1943), a case in which the Supreme Court actually sanctioned the use of race to justify forcing Japanese Americans to observe a military curfew order and to register for involuntary relocation from West Coast areas to concentration camps during World War II. *Id.* at 81. Indeed, *Hirabayshi* and *Korematsu v. United States*, 323 U.S. 214 (1944), provided the legal justifications for the wholesale incarceration and forced removal of 120,000 persons of Japanese ancestry. For an in depth analysis of the significance of these decisions from various perspectives, see *Symposium: The Long Shadow of Korematsu*, 40 B.C. L. REV. 349 (1998); 19 B.C. THIRD WORLD L.J. (1998).

quirement was a race-based voting qualification prohibited by the Fifteenth Amendment.[117]

Given the quagmire of the Court's racial jurisprudence, OHA and the State of Hawai`i argued that the OHA voting restriction was not race-based. Rather, they explained, the OHA voting requirements were consistent with laws "that recognize the special status of aboriginal people . . . not based on race, but the aboriginal peoples' ownership of land and self-government before Europeans took control of their lands."[118] This was given short shrift by the Court. Although the majority implicitly disputed the OHA and State's position, the Court stated that it would "stay far off [the] difficult terrain" of whether Congress could treat the Native Hawaiians as it does the Indian tribes."[119] The Court held that OHA elections were elections of public

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117. *Rice*, 528 U.S. at 516 (quoting the definition of "Native Hawaiian" as "any descendant of not less than one-half part of the races inhabiting the Hawaiian islands previous to 1778" "Hawaiian" is defined as any descendant of the "aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778." *Id.* (quoting HAW. REV. STAT. § 10-2).

118. OHA Brief, *supra* note 18, at 14. OHA argued that "[t]he Constitution allows Native Americans to exercise control over assets set aside for their benefit." *Id.* Congress had the power to recognize aboriginal peoples, and federal legislation "reasonably designed to further the cause of Indian self-government" was constitutional. *Id.* (quoting Morton v. Mancari, 417 U.S. 535, 553-54 (1974)). This recognition was not confined to Native American "tribes" because Native Alaskans and the Pueblo people (who were formerly citizens of Mexico) also have been federally recognized. *Id.* at 17-20. Moreover, Congress "has repeatedly recognized Native Hawaiians as an aboriginal people with a special relationship to the United States." *Id.* at 16 (citing numerous statutes defining Native Hawaiians as Native Americans). Accordingly, the Constitution's provisions with respect to Indians encompass Native Hawaiians. *Id.* at 15-16.

OHA also argued that the special political status of aboriginal peoples was not implicated by the Fourteenth and Fifteenth Amendments because the language of the amendments excluded "Indians not taxed," explicitly in the case of the Fourteenth Amendment, and by clear implication in the Fifteenth. Thus, "differential treatment for Indians," including specific preferences for Indians, was permitted under the Fourteenth and Fifteenth Amendments. *Id.* at 22 (citing *Mancari*, 417 U.S. at 554-55). OHA concluded by arguing that Congress had delegated its authority to the State of Hawai`i, had ratified the establishment of OHA to benefit Native Hawaiian people, and that the State of Hawai`i had independent authority to aid its aboriginal people so long as it did not contradict federal law. *Id.* at 26-29. For an in-depth examination of the political status of Native Hawaiians, see Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 YALE L. & POL'Y REV. 95, 98-101 (1998) (responding to the thesis of an article written by Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537 (1996) (native people are a racial classification unless they are organized into "tribes")).

119. *Rice*, 528 U.S. at 519. The Court assumed for sake of argument, "without intimating any opinion," that the underlying OHA structure was valid. *Id.* at 523-24. The phrasing of the Court's finesse of the issues, however, was disingenuous. The Court signaled its conclusion by holding that Native Hawaiians are a race for OHA voting purposes and through its language limiting Congressional authority to Indian "tribes." *Id.* at 518-20. Moreover, by designating OHA simply as a "an arm of the State," the

officials of a state agency, and not elections related to the internal affairs of a "quasi-sovereign" tribe.[120]

In the midst of the legal battle over the categorization of Native Hawaiians, a cacophony of popular media on the continent identified the issue in *Rice* as a purely "racial" case using traditional civil rights terms.[121] The success of this obfuscation was almost inevitable in an

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Court signaled its rejection of OHA's argument that Congress had delegated its authority over Native Americans to the State through OHA. *Id.* at 523.

Justices Breyer and Souter were less equivocal in their concurrence. They argued that there was never any trust intended for Native Hawaiians and that "OHA's electorate as defined in the statute [did] not sufficiently resemble an Indian tribe". *Id.* at 525 (Breyer, J., and Souter, J., concurring). Indeed, the Breyer and Souter concurrence is, in some ways, even more disingenuous than the majority opinion.

Justice Breyer found that the definition of Hawaiian, articulated in the OHA voting requirements (anyone with an ancestor living in Hawai`i prior to 1778), was so broad as to be "unreasonable" and that, in any event, the definition was not a construction of the Hawaiian people themselves, but of a state entity. *Id.* at 526-27. While seemingly more deferential to notions of self-determination, Justice Breyer also engaged in abstract and formalist speculation. Justice Breyer argued that the definition of "Hawaiian" was too broad, including the definition "individuals who are less than one five-hundredth original Hawaiian (assuming nine generations between 1778 and the present)." *Id.* at 526. The reality, however, is that the rural history of Hawai`i, combined with the devastation of the Hawaiian people by disease after the introduction of Westerners, make Justice Breyer's notion of part-Hawaiians who could claim only one ancestor nine generations back a strawman—theoretically possible, but realistically remote. It has been estimated that by 1921 "devastated by poverty, disease and political powerlessness, Hawaiians were clearly in danger of losing the battle to survive as a race." HANDBOOK, *supra* note 66, at 44; *see also* Hawaiian Homestead Brief, *supra* note 64, at 2 ("The native people of Hawai`i lost 99% of their lands and over 90% of their population in the 120 years between discovery (1778) and annexation (1898).").

Justice Breyer's view is seemingly more progressive—that Hawaiians and not the state should set the definition of group membership. This argument, however, ignores the cohesive voice of a people who have been repeatedly silenced by outside forces. For these individuals, transitional entities such as OHA have become the only practical alternative. In that respect, Justice Stevens's dissent is equally apt in response to the concurrence: "[I]t is a painful irony indeed to conclude that native Hawaiians are not entitled to special benefits designed to restore a measure of native self-governance because they currently lack any vestigial native government—a possibility of which history and the actions of this Nation have deprived them." *Rice*, 528 U.S. at 535 (Stevens, J., dissenting).

120. *Id.* at 520.

121. *See, e.g.*, Joan Biskupic, *Supreme Court Hears Arguments in Race, Voting Rights Cases*, WASH. POST, Oct. 7, 1999, at A11 (describing *Rice* as a "racial discrimination" case); *Can Racial Bias Ever Be Legal?; DOJ Strains to Legitimize Hawaii Law that Violates 15th Amendment*, FULTON COUNTY DAILY REP., Aug. 17, 1999; Bruce Dunford, *Hawaii's Race Dilemma, Court to Rule on Natives' Special Rights*, CHARLESTON GAZETTE, Oct. 4, 1999, at 7A (describing Hawai`i's population as "diverse but not always equal" and stating that Hawaiians enjoy "special race-based voting privileges"); Bruce Fein, Editorial, *Hawaii and Race*, WALL ST. J., Oct. 10, 1999 (describing the OHA voting requirement as "overtly based on an ethnic criterion" and calling for the Supreme Court not to permit Hawai`i to open the door to "racial categories in voting");

environment uneducated about the complexities of Hawaiian history and culture, and accustomed to dealing with racial issues in simplistic and biological terms. The popular press and media portrayed Hawaiian claims, and specifically the OHA voting requirement, in the context of traditional affirmative action disputes. This entirely obscured the real issue at stake—redress for the usurpation of Hawaiian sovereignty.[122]

Redress for the loss of independence, however, is entirely different from the original notion of affirmative action. Affirmative action proposed new institutional priorities to ensure equality of access to services and to address the inequality of opportunity imposed upon minority groups within the United States. Both traditional affirmative action rationales providing more opportunities for those historically denied access and the basic arguments against them--"reverse" racial preferences—are inapposite when dealing with redressing harms suffered by colonization and the loss of sovereignty.[123]

The confusion of these issues was not completely unforeseeable. The OHA and State of Hawai`i's position that Native Hawaiians are not a racial group is, at first glance, counterintuitive.[124] Unless one regards race simply as an individual's biological makeup, Justice Stevens' notion in his *Rice* dissent that the appropriate racial category for Native Hawaiians is within the broader category of Polynesians, and not a subset of Hawaiians,[125] leaves matters of inherited

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Bruce Fein, *Resurgent Racism in Hawaii?*, WASH. TIMES, Mar. 30, 1999, at A16 (characterizing the OHA requirement as "racial discrimination"); Brian M. Kavanaugh, *Are Hawaiians Indians?: The Justice Department Thinks So*, WALL ST. J., Sept. 9, 1999, at A35 (opining that Hawaiians were not a "tribe" and therefore not entitled to the OHA "racial voting scheme"); J.R. Labbe, *On the Big Docket*, FORT WORTH STAR-TELEGRAM, Oct. 10, 1999, at 5 (describing the *Rice* case as whether Hawai`i can "limit by race the voters who will elect a nine-member board"); David Tell, *Hawaii's Nuremberg Laws*, WEEKLY STANDARD, Oct. 4, 1999, at 9 (calling the OHA requirement "disgusting," "ugly," and "Racist").

122. In a "Morning Edition" broadcast on National Public Radio, host Nina Totenberg described the *Rice* case as being about two different "views of race in America." She stated that the issue was simply about one vision wanting "to end racism using government intervention . . . [while the] other vision seeks to end the consideration of race at all." *Morning Edition*, (Nat'l Pub. Radio broadcst, Oct. 6, 1999).

123. President Johnson's Executive Order in 1967 included gender discrimination and prohibited racial discrimination in federal employment or by government contractors. Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *amended by* Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970). Under section 202 of Executive Order No. 11,246, government contracts were required to contain a provision whereby the contractor agreed to take affirmative action to ensure equal employment opportunities. Chrysler Corp. v. Brown, 441 U.S. 281, 286 n.1 (1979).

124. OHA Brief, *supra* note 18, at 3 ("'Native Hawaiian' is thus not a reference to a racial group . . . .").

125. Justice Stevens opined that if the voter class actually were defined in terms of race it would confine OHA voters to "full-blooded Polynesians." *Rice*, 528 U.S. at 544

traditions, culture, history, experience, connection to the *'aina*, and perspective, as well as the historical positioning of Hawaiians in relation to Western intruders—often marked by racial discrimination—without any mooring in terms of the relation of these phenomena to race.[126]

Indeed, the distinction between racial discrimination, which is protected by the equal protection clause, and the loss of sovereignty, which is contemplated by the Court's "Indian jurisprudence" such as *Morton v. Mancari*,[127] may be illustrated by contrasting the histories of the sugar plantation system in Hawai`i in the early twentieth century with the contemporaneous illegal takeover of Hawai`i.

In the late nineteenth and early twentieth centuries, "Sugar [was] destined most emphatically to be 'King.'"[128] The plantation system was structured on a racial and class hierarchy.[129] By 1882, whites

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(Stevens, J., dissenting). Justice Kennedy's questioning at oral argument of John G. Roberts, Jr., the attorney for respondent State of Hawai`i, indicated that in his view that "real issue" was race and that his framework for considering race was solely in traditional "equal access" terms:

> Justice Kennedy: Well, it seems to me, Mr. Roberts, that you begin by saying, now, this is not race, it's a trust. If we had a trust in Oklahoma for people who could vote in 1910, and they could go to a special school, everyone knows that the reason for that would be that they were white, and it seems to me that you're almost afraid of your own best argument by telling us not to look at race. Of course it has to do with Hawaiian ethnicity. That's your whole argument, I thought. . . .
>
> Mr. Roberts: Oh, that is . . . .
>
> Justice Kennedy: . . . [A]nd it seems to me that when you tell us, oh, don't worry about it, it's a trust, that just diverts our attention from the real issue in this case.

Supplement Transcript, *supra* note 49; Westlaw Transcript, *supra* note 49, at 12-13. Justice Kennedy was solely identified in the former source, but the colloquy was reported in both sources.

126. In his *Rice* dissent, Justice Stevens tried to separate culture from race by stating, "the inhabitants of the Hawaiian Islands whose descendants comprise the instant class are identified and remain significant as much because of culture as because of race. . . . It is this culture, rather than the Polynesian race, that is uniquely Hawaiian and in need of protection." *Rice*, 528 U.S. at 542 n.14 (Stevens, J., dissenting). However, the distinction between "race" and "culture" is not so clear. *See* Mary Coombs, *Interrogating Identity*, 2 AFR. AM. L. & POL'Y REP. 222, 226-27 (1995) (discussing various approaches to defining race as shared cultural experience).

Moreover, the critical relationship of culture to the political sovereignty of indigenous people has been expressed as "[t]he American lesson is that while political autonomy does not necessarily translate into cultural autonomy, the tribes' lesson is that political autonomy is a prerequisite for cultural autonomy." Richard A. Monette, *Sovereignty and Survival*, 86 A.B.A. J. 64, 65 (Mar. 2000).

127. Morton v. Mancari, 417 U.S. 535, 553-54 (1974) (stating that preferences for Native Americans were not racial preferences but instead were related to " Indian self-government").

128. RONALD TAKAKI, STRANGERS FROM A DIFFERENT SHORE 132 (2d ed. 1998).

129. *Id.* at 138-40.

held 88% of the skilled and supervisory positions while approximately 77% of laborers were either Hawaiian or Chinese.[130] Whites were overwhelmingly awarded supervisory positions, and in 1904, the Hawaiian Sugar Planters' Association passed "a resolution that restricted skilled positions to 'American citizens, or those eligible for citizenship.'"[131] This, in effect, excluded all Asians from skilled or supervisory occupations because they were ineligible to become naturalized citizens.[132] By 1915, 90% of all mill engineers were of European ancestry.[133] Life on the plantation was hard, often brutal, and racially stratified.[134] In a recent report submitted to the President's Advisory Board on Race, the authors observed:

> Hawai`i's present racial realities also trace their root to the segregation of the plantation-era society. The plantation's "divide and conquer" system maintained a rigid race-based hierarchy in wealth, education, housing conditions, and employment opportunities, with whites at the top, Portuguese as overseers, and Chinese, Japanese, Korean, and Filipino laborers at the bottom in descending order. Over the years, Hawai`i's economy has evolved from agriculture and military spending to service industry. Racial stratification persists in what has been described as a modern-day plantation system centered around tourism. Those struggling at the socioeconomic bottom now include Samoans, Hawaiians and Tongans, and Korean, Southeast Asian and Filipino immigrants. Many of these groups perceive distinct, although often subtle, racial and ethnic discrimination in jobs, schools and housing.[135]

The equal protection clause contemplates institutionalized racial stratification having an impact on discrete American racial groups in terms of equal opportunity and treatment within the context of state action. This is a kind of discrimination that affects not only Hawaiians, but Filipinos, immigrants, other Pacific Islanders, African Americans, and others. But those claims, as compelling and critical as they are, differ fundamentally from those of Hawaiians with respect to the harms they continue to suffer due to the loss of their homeland.[136]

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130. *Id.* at 140.

131. *Id.* at 140-41.

132. *Id.* at 141.

133. *Id.*

134. *Id.*

135. GLENN MELCHINGER, ET AL., HAWAI`I RACE REPORT (submitted to Angela Oh, member of the President's Advisory Board on Race, September 10, 1998) (footnotes omitted).

136. *See* WILL KYMLICKA, MULTICULTURAL CITIZENSHIP (1995). Kymlicka observes that the "badge of inferiority" for racial and ethnic minorities is their forcible exclusion from institutions of the larger polity, whereas for indigenous peoples, it is forcible inclusion. *Id.* at 59-60.

Moreover, the political relationship of the Hawaiian people to the United States is not contradictory to the notion they also have been subordinated as a racial grouping. Anti-discrimination laws were not intended to, and do not, invalidate special governmental relationships with indigenous people. Because anti-discrimination laws were established to "level the playing field" for victims of racial discrimination within the polity of America, standard civil rights and equal protection doctrines do not apply to circumstances involving the remedy for the displacement of a sovereign people from their homeland.[137]

In the Court's famous "footnote 4" in *United States v. Carolene Products Co.*, the Court framed the need for heightened judicial scrutiny to protect discrete and insular minorities in the context of conditions which tended "seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."[138]

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137. Eric K. Yamamoto, Draft Amicus Brief for various Asian American organizations at 3 (on file with author) [hereinafter Yamamoto]. I drew much inspiration for this piece from a draft amicus brief Professor Yamamoto authored during the *Rice v. Cayetano* litigation. While the brief was not ultimately submitted to the Supreme Court, its substantive approach is instructive not only in the *Rice* case, but in suggesting how to deal with issues involving race and indigenous rights in general.

138. United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). The extent to which the circumstances of the Fourteenth Amendment were debated in the context of its effect on a strictly "American" polity is vividly illustrated in an extraordinary exchange between Representative William Higby, Republican of California, and Representative William Niblack, Republican of Indiana, during the debate over the Fourteenth Amendment on the floor of the House of Reresentatives in February of 1866:

> WILLIAM NIBLACK [R., Ind.]. I beg to inquire of the gentleman whether the [Fourteenth] amendment to the Constitution he is advocating is intended or calculated to have any effect on the condition of the Chinaman in California. . . .
>
> MR. HIGBY. The Chinese are nothing but a pagan race. They are an enigma to me, although I have lived among them for fifteen years. You cannot make good citizens of them; they do not learn the language of the country; and you can communicate with them only with the greatest difficulty, as their language is the most difficult of all those spoken; they even dig up their dead while decaying in their graves, strip the putrid flesh from the bones, and transport the bones back to China. They bring their clay and wooden gods with them, and as we are a free and tolerant people, we permit them to bow down and worship them. . . .
>
> MR. NIBLACK. I understand that gentlemen on the other side have taken the position that intelligence is not at all necessary to the exercise of the right of voting; that a man, from the fact of belonging to the human race, is entitled to vote and to be called a man and brother. . . . If a Chinaman is one of the human race, why should he be degraded below the negro? Why should he not receive the same right as the negro? I should like to understand it. The negro is of pagan race, and is pagan before he comes here.
>
> MR. HIGBY. But he is not pagan now. The negro is as much a native of this country as the gentleman or myself. . . .
>
> MR. NIBLACK. I want to understand why we should exclude one race and in-

Strict scrutiny analysis, therefore, explicitly rested upon the need for protection from discrimination against disempowered groups within the political process of the American social fabric.

The purpose of OHA and its voting requirement's are different from remedying past discrimination. They are a part of a panoply of political measures to address the harm attendant to the loss of Hawaiian sovereignty.[139] The creation of governmental structure, voting, land reclamation, and cultural resurrection "are not efforts to remedy unequal treatment of those voluntarily seeking full participation in the polity. They are in every usage of the term, sovereign 'political' acts that are not subject to standard strict scrutiny analysis."[140]

The harms to Native Hawaiians at issue are harms not rooted in racial discrimination, but rather harms rooted in the loss of sovereignty. These harms directly stem from egregious alienation from land and culture.[141] Not all people in Hawai`i have an equal claim to the immense harm caused by the dispossession of Hawai`i by the United States; these are claims only of the indigenous Hawaiian people.

The Congressional Joint Resolution of Apology itself acknowledged that "the health and well being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land."[142] The "impacts associated with losing control over ancestral land and resources can be seen in virtually every indicator of social or economic progress."[143] The statistics with respect to the problems within the Hawaiian community "reflect the individual and collective pain, bitterness and trauma of a people whose sovereignty has been and remains suppressed; who are dispossessed in their own homeland; and who lack control of the resources of their ancestral lands to provide for the welfare of their people."[144]

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clude another, why we should deny to these people the right of naturalization, for instance, and allow it to others.

MR. HIGBY. I will tell him. They are foreigners and the negro is a native.

STATUTORY HISTORY OF THE UNITED STATES, PART I 197-98 (Bernard Schwartz, ed.,1970).

139. Hawaiian Homestead Brief, *supra* note 64, at 18; *see also* Yamamoto Brief, *supra* note 137, at 9 ("OHA was not established to compensate victims of racial discrimination. Rather, it was created by the political act of a prevailing sovereign addressing the loss of internationally recognized sovereignty of Hawaii's indigenous people.").

140. Yamamoto Brief, *supra* note 137, at 4.

141. Hawaiian Homestead Brief, *supra* note 64, at 19 (quoting OFFICE OF HAWAIIAN AFFAIRS, NATIVE HAWAIIAN DATA BOOK iii (1998)).

142. Apology Resolution of 1993, *supra* note 47.

143. Hawaiian Homestead Brief, *supra* note 64, at 20; Yamamoto Brief, *supra* note 137, at 10.

144. Yamamoto Brief, *supra* note 137, at 11; Hawaiian Homestead Brief, *supra* note 64, at 20 (quoting LUCIANO MINERBI ET AL., NATIVE HAWAIIAN AND LOCAL CULTURAL

Notions of "race" are not completely irrelevant to the inquiry, however.[145] Even Queen Lili'uokalani articulated the destruction of sovereignty in racial terms:

> And yet this great and powerful nation must go across two thousand miles of sea, and take from the poor Hawaiians their little spots in the broad Pacific, must covet our islands of Hawai`i Nei, and extinguish the nationality of my poor people, many of who have now not a foot of land which can be called their own. And for what? In order that another race-problem shall be injected into the social and political perplexities with which the United States in the great experiment of popular government is already struggling?[146]

The white supremacist assault and attempted destruction of a people, culture, and historical tradition, all intrinsically connected to a "racial" nexus, are inextricably connected to the political status of native peoples.[147] The colonization of native people is wrapped and

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ASSESSMENT PROJECT 15 (1993)).

In Hawai`i, Native Hawaiians are more likely than any other group to be unemployed, in prison, and poor, with the highest rates of suicide and infant mortality and the lowest life expectancy. Erin Texeira, *Native Hawaiians Gather at Capitol to Bring Attention to Plight*, DALLAS MORNING NEWS, Aug. 9, 1998, at 14; *see also* Mark Tran, *Smiles Vanish in Fight for Rights*, GUARDIAN (London), Aug. 25, 1996, at 16 (55% fail to finish high school, 7% have university degrees, and Native Hawaiians, while 19% of the population, comprise 40% of the prison population); *Anniversary Stirs Hawaii Sovereignty Movement*, N.Y. TIMES, Jan. 18, 1993, at A15 (citing OHA). Native Hawaiians suffer disproportionately high rates of poverty, alcoholism, suicide, incarceration, and homelessness. Ellen Nakashima, *Native Hawaiians Consider Asking for Their Islands Back; 100-Year-Old Cause Spurs Sovereignty Vote*, WASH. POST, Aug. 27, 1996, at A01. Natives have a 34% higher mortality rate from cancer, heart disease, diabetes, and "all other causes of death" compared to the U.S. population. Zan Dubin, *Ill Health Bedevil a Once Happy-Go-Lucky Culture*, L.A. TIMES, Aug. 30, 1990, at E1.

145. Indeed, one of the criteria for whether a group qualifies as a "tribe" is the racial cohesiveness of the group. *See supra* note 4.

146. Yamamoto Brief, *supra* note 137, at 91-100 (quoting LYDIA KAMAKA'EHA LIL'OUKALANI, HAWAII'S STORY BY HAWAII'S QUEEN 309-10 (1990 ed.).

147. Professor Robert Williams observes:

> Like all the varied discourses comprising and enriching Western society's thousand-year-old legacy of aggression against peoples of color, the discourses of opposition to tribal sovereignty reflected throughout the various documents of barbarism of past and contemporary Indian policy discourses seek to justify the white man's privileges of aggression against tribalism through racism. The tribal Indian's cultural inferiority justifies the superior white society's privilege of domination. The use of racism to privilege the white man's aggression against peoples of color is . . . the fundamental mechanism common to all European-derived colonizing discursive practices.

Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237, 276-77 (1989). Williams quotes Albert Memmi's explanation of why racism is an indispensable weapon of the colonizer:

> The fact remains that we have discovered a fundamental mechanism, common to all racist reactions: the injustice of an oppressor toward the op-

justified in the rhetoric and the ideology of white supremacy.[148] As Professor Haunani-Kay Trask states:

> As a result of [American colonization], Hawaiians became a conquered people our lands and culture subordinated to another nation. Made to feel and survive as inferiors when our sovereignty as a nation was forcibly ended, we were rendered politically and economically powerless by the turn of the century. Cultural imperialism had taken hold with conversion to Christianity in the middle of the nineteenth century, but it continued with the closing of all Hawaiian language schools and the elevation of English as the only official language in 1896. Once the Republic of Hawai`i declared itself on July 4, 1894, the "Americanization of Hawai`i was sealed like a coffin.[149]

Trask's observation echoes that of Frantz Fanon in his work on European colonialism in Africa. Fanon linked racial superiority and the denigration of indigenous culture directly to both the effect and effectuation of colonial domination:

> Every colonized people—in other words, every people in whose soul

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> pressed, the formers permanent aggression or the aggressive act he is getting ready to commit, must be justified. And isn't privilege one of the forms of permanent aggression, inflicted on a dominated man or group? How can any excuse be found for such disorder (source of so many advantages), if not by overwhelming the victim? Underneath its masks, racism is the racist's way of giving himself absolution.

Id. at 277 (quoting A. MEMMI, THE COLONIZER AND THE COLONIZED 194 (1965)) (emphasis omitted).

148. There was a drumbeat of arguments relating to Native Hawaiian racial inferiority during the period surrounding the overthrow. "After the Bayonet Constitution, racist arguments about Native cultural inferiority and political and economic inability appeared daily in the haole newspapers of the times, justifying the seizure of power and the deafening calls for annexation." TRASK, *supra* note 56, at 12.

In 1998, the University of Hawai`i renamed its social sciences building from Porteus Hall to the Social Science Building. *BOR Renames Porteus Hall and Creates Outreach College*, Newsletter of the University of Hawai`i System (Apr. 10, 1998), *available at* http://www.hawaii.edu/news/kulama/980424/kulama980424.html. The former Porteus Hall at the University of Hawai`i-Manoa had been named in honor of Stanley David Porteus in 1974, but there were widespread protests against this because of Porteus's racist views on native Hawaiians and other people of color in Hawai`i. *Old Debate Over U. of Hawaii Building's Name Is Rekindled*, CHRONICLE OF HIGHER EDUC., JAN. 23, 1998, at A8. In a 1926 book entitled "Temperament and Race," Porteus used overtly racist attitudes of Hawai`i plantation overseers as scientific data and created a "scientific theory" which held that Hawaiians were inherently immature, shallow, and had "poor mental keenness"; Chinese were secretive, criminal, and had "low brain capacity"; Filipinos were incapable of education; Japanese were unreliable and disloyal; Portuguese were to be considered not representative of the white race as they had a "mixture of negro blood"; and Blacks were characterized by "absolute inferiority." David Stannard, *Why Porteus Hall must be Renamed*, HONOLULU STAR BULLETIN, Dec. 12, 1997, *available at* http://starbulletin.com/97/12/12/editorial/viewpointf.html.

149. Trask, *supra* note 56, at 16.

> an inferiority complex has been created by the death and burial of its local cultural originality—finds itself face to face with the language of the civilizing nation; that is, with the culture of the mother country. The colonized is elevated above his jungle status in proportion to his adoption of the mother country's cultural standards. He becomes whiter as he renounces his blackness, his jungle.[150]

Thus, while the status of the Hawaiian people is fundamentally an issue involving the political relationships between the American and Hawaiian people, it is also inherently an issue with racial overtones and consequences. Yet these racial consequences contain fundamentally different meanings and remedies from those faced by American racial minorities.

In essence, the Supreme Court "mistakenly assumes that every classification involving race in any fashion is subject to standard equal protection strict scrutiny analysis."[151] According to standard contemporary legal doctrine, however, such analysis "is justifiable only where necessary to remedy present discrimination or the present effects of past discrimination."[152]

Even cases which categorize certain claims of Native people as "political" rather than "racial", such as *Mancari*, do not ignore the racial elements involved in the relationship between the United States and indigenous people, but instead focus on the remedies for loss of their sovereignty. As Jon Van Dyke points out:

> It is important to note that the *Mancari* preference was not free of racial overtones, because, as the Court observed, an individual did have to have "one-fourth or more degree Indian blood" to qualify for preference.
>
> The Court thus recognized that it was dealing with a mixed political/racial category, but it nonetheless concluded without hesitation that the "rational basis" level of judicial review should apply, because the prominent feature of this category was the political rela-

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150. FRANTZ FANON, BLACK SKIN, WHITE MASKS 18 (1967). Fanon eloquently poses the cultural and racial imperative that white racial supremacy forced upon colonized people:

> [I] begin to suffer from not being a white man to the degree that the white man imposes discrimination on me, makes me a colonized native, robs me of all worth, all individuality, tells me that I am a parasite on the world, that I must bring myself as quickly as possible into step with the white world, "that I am a brute beast, that my people and I are like a walking dung-heap that disgustingly fertilizes sweet sugar cane and silky cotton, that I have no use in the world." Then I . . .will compel the white man to acknowledge that I am human.

Id. at 98 (citation omitted).

151. Yamamoto Brief, *supra* note 137, at 7.

152. *Id.*

> tionship between native people and the United States government.[153]

Even the Ninth Circuit's *Rice* opinion, which upheld the requirement of Hawaiian ancestry in the OHA voting scheme, stated that the requirement was "a racial classification on its face."[154] As the Supreme Court pointed out in *Mancari*, "antidiscrimination laws were not intended to, and do not invalidate governmental relationships with our aboriginal people, who in some circumstances are racially defined."[155] Justice Stevens underlined this approach in his *Rice* dissent:

> As the preceding discussion of *Mancari* and our other Indian law cases reveal[s], this Court has never understood laws relating to indigenous peoples simply as legal classifications defined by race. Even where, unlike here, blood quantum requirements are express, this Court has repeatedly acknowledged that an overlapping political interest predominates.[156]

This is why the fundamental inquiry the Supreme Court undertook was so misplaced. The inquiry should not be whether Native Hawaiians constitute a "race" or a "tribe," or even whether "Hawaiian ancestry is a proxy for race." Instead, the question should be whether they have been specifically harmed as a people by the loss of their nationhood.[157]

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153. Van Dyke, *supra* note 118, at 114 (citing *Mancari*, 417 U.S. at 554).

154. Rice v. Cayetano, 146 F.3d 1075, 1079 (9th Cir. 1998), *aff'd*, 528 U.S. 495 (2000).

155. Yamamoto Brief, *supra* note 137, at 7.

156. *Rice*, 528 U.S. at 538-39 n.12 (Stevens, J., dissenting).

157. For an exploration of the reasons why the *Mancari* rational basis standard is not applicable only to Indian "tribes," but also to native peoples not organized into tribes, see Van Dyke, *supra* note 118, at 113-119, 126-130. As Van Dyke cogently observed: "[U]nlike other ethnic groups who can look to their ancestral homelands to revisit their culture and see that their heritage is being maintained, native groups have nowhere else to look." *Id.* at 138 (citing Carole Goldberg-Ambrose, *Not "Strictly" Racial: A Response to "Indians as Peoples,"* 39 UCLA L. REV. 169, 184 (1991)). Moreover, Congress has specifically defined Native Hawaiians as Native Americans in at least twenty Acts of Congress and has recognized OHA in at least eight. OHA Brief, *supra* note 18.

In direct reaction to the *Rice* decision, on July 20, 2000, Senators Daniel Akaka and Daniel Inouye of Hawai`i introduced into the second session of the 106th Congress a bill "to express the policy of the United States regarding the United States' relationship with Native Hawaiians." S. 2899, 106th Cong. (2000). The bill specifically recognizes that the United States "has a special trust relationship" with Native Hawaiians and reaffirms the Apology Resolution. *See supra* note 33. It also recognizes the continuing separate cultural, social, and political character of the Native Hawaiian people, the desire and right of Native Hawaiian people for self-determination, and the existence of a distinct "political and legal" relationship. It creates an Office of Special Trustee for Native Hawaiian Affairs within the Department of the Interior, the establishment of a Native Hawaiian Interagency Task Force under the Executive to coord i-

It is not acceptable to confuse the remedy for loss of nationhood with the remedy for the denial of equal access to political, social, and economic power demanded by other subordinated groups within America. The legal and political remedies are as different from one another as are the cures for different diseases. To carry the medical metaphor further, we understand from experience that cures for different diseases may be different, cures for different symptoms of the same disease may be different, and even that cures for different diseases may be the same.[158] But there can be no "cure" without proper diagnosis.

In the final analysis, justice is about rectifying harms. The harm to be rectified in *Rice* must be relevant to the process of this nation's reconciliation with the indigenous Hawaiian people for the dispossession of their homeland by our government. Consequently, mechanisms which purport to serve only Hawaiians must be seen not as "preferences" but, in a deeper sense, as penance and healing. Through entities like OHA, Hawaiians are not seeking privileges or handouts. Rather, they are asserting basic international human rights—not simply the right to be treated equally but the right to self-determination; not a right to entitlements, but to reparation; not a right to "special treatment," but an opportunity to reconnect spiritually with land and culture illegally taken from them; not a right to greater participation in the U.S. polity, but a form of governmental sovereignty outside the American polity.

All people of Hawai`i—native and non-native alike—have a stake in seeing justice done. Failing to distinguish between the harms to an indigenous people resulting from loss of their sover-

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nate federal policies affecting Native Hawaiians, and the preparation for the organization of a Native Hawaiian Interim Governing Council to implement the process of creating a Native Hawaiian Governing Body that will be recognized as the "representative governing body of the Native Hawaiian people." *Id.*

The passage of this bill would certainly place Native Hawaiians squarely within the ambit of *Mancari* and weaken the doctrinal underpinnings of the *Rice* majority opinion. However, the bill simultaneously creates other problematic issues for the Native Hawaiian people to resolve such as what the implications of an explicit articulation of a "trust relationship" with the United States are with respect to sovereignty. *See e.g.*, Harold Morse, *Akaka's Bill Gets Mixed Response*, HONOLULU STAR-BULLETIN, Aug. 1, 2000, *available at* http://starbulletin.com/2000/08/01/news/story12.html.

Moreover, while the bill is a slap at the majority's decision, it will likely have no impact on the Supreme Court's continued formalist and reactionary approach to race and racial jurisprudence. Perhaps the ultimate irony and tragedy of the *Rice* decision, and the answering Akaka Bill itself, is that it continues to force another binary choice—the risk of the loss of governmental programs benefitting Hawaiians or the acceptance of a ward status—similar to that of Native Americans—under the United States federal government when there are so many other choices possible.

158. Moreover, one of the effects the loss of an indigenous people's sovereignty often has racially discriminatory aspects. *See supra* notes 126-28 and accompanying text.

eignty and the harms resulting from the denial of equal social and political access within the larger American society of its minority populations ensures that no "cure" to either will be forthcoming.

EPILOGUE

One of my research assistants, Hokulei, lent me her book of Hawaiian proverbs and sayings. I found in it a Hawaiian expression, "Ho'i no kau me 'oe (May yours return to you)." According to the book's translation and explanation, it is a reply to a person who utters a curse and thus it means, "I do not accept your curse" and frees the speaker from trouble.[159] I offer that expression on behalf of all people who have been cursed by a system and a Supreme Court that will not respond to cries for reparation, claims of inclusion, and calls for justice:

HO'I NO KAU ME 'OE.

159. MARY KAWENA PUKUI, 'OLELO NO'EAU, HAWAIIAN PROVERBS AND POETICAL SAYINGS 111 (1983).

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